In The

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-575

NED N. RICHARDSON and DOROTHY M. RICHARDSON,

Petitioners,

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit	1
Opinions below	2
Jurisdiction	2
Question Presented	3
Statute in Pertinent Part	3
Statement of the Case	4
Reasons for granting the writ	5
Conclusion	
APPENDIX	
Order denying Petition for Rehearing. U.S. Court of Appeals 9th Circuit July 9, 1979	A-1
Opinion of Court of Appeals May 11, 1979	A-2
30 U.S.C. §612	A-12
16 U.S.C. §551	A-14
16 U.S.C. §478	A-15
43 CFR §3712.1	A-15
Testimony, Committee on Interior and Insular Affairs hearing on S-1713, S. Rept. No. 554, 84th Cong. 1st Sess. 1955, pages 65, 66	A-16

Page

U.S. District Court for Oregon
Findings of Fact and Conclusions
of Law March 7, 1977 Opinion A-19

U.S. District Court for Oregon
Final Judgment and Decree
May 25, 1977 A-36

TABLE OF AUTHORITIES CITED Page

Cases

Converse v. Udall, 399 F2d 616
(9th Cir. 1967) 10

Ernst & Ernst v.Hochfelder,
425 U.S. 187 (1976) 15

Gwillim v. Donnellan, 115 U.S.
45, 49, 50 (1885) 10

Mantle v. Noyes, 9 Pac. 856, 862 10

New York v. U.S.I.C.C. et al.,
342 U.S. 882 13

Noyes v. Mantle, 127 U.S. 348
(1888) 10

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 15

Silver Bow Mining and Milling
Company v. Clark, 9 Pac. 570,
574, 576 10

Teller v. United States, 113 Fed
273 (8th Cir. 1901) 12

Union Oil Co. v. Smith, 249 U.S.
337, 348, 349 (1919) 10

Table of Authorities (continued) Page

United States v. Curtis-Nevada Mines, Inc., 415 F Supp 1383 (E. D. Cal. 1976) 13

United States v. Etcheverry, 230 F2d 193 (10th Cir. 1956) 12

United States v. Nogueira, 403 F2d 816 (9th Cir. 1968) 12

United States v. North American Transportation and Trading Company, 253 U.S. 330 (1920) 10

United States v. Rizinelli, 182 Fed. 675 (D. Idaho 1910) 12

United States v. Toole, 224 F Supp 440 (D. Mont. 1963) 12

Wilbur v. United States ex rel. Krushnic, 280 U.S. 306 (1930) 10

STATUTES

Organic Administration Act of 1897, 16 U.S.C. §482 11

16 U.S.C. §551 12

16 U.S.C. §478 12

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

28 U.S.C. §1345 2

30 U.S.C. §22 9

30 U.S.C. §612 2,3,5,6,8

Table of Authorities (continued) Page

PERIODICALS AND TREATISES

Congressional Record, Senate 1911
Feb. 19, 1974 14

Committee on Interior and Insular
Affairs, hearing on S-1713,
S. Rept. No. 445, 84th Congress,
1st Session, 1955, pp. 65, 66 7

House Report No. 730, U.S. Code,
Cong. & Admin. News, 1955, pp.
2482-2483 7,8,9

Mineral Facts and Problems,
published by Bureau of Mines,
U.S. Dept. of the Interior,
1970 ed. p. 538 11

William E. Simon, "A Time for
Truth", McGraw Hill, New York
1978 16

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No.

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v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Ned N. Richardson and Dorothy Richardson, pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered on May 11, 1979 and denial of Petition for Rehearing filed July 9, 1979.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals is set forth in the Appendix A-2,

The Court's order denying petitioners' Petition for Rehearing is set forth in the Appendix A-1

The unreported opinion of the United States District Court for the District of Oregon is set forth in the Appendix A-19.

JURISDICTION

The Supreme Court of the United States has jurisdiction under 28 U.S.C. 1254(1).

The United States Court of Appeals for the Ninth Circuit had appellate jurisdiction under 28 U.S.C. 1291.

The United States District Court for the District of Oregon had original jurisdiction under 28 U.S.C. 1345.

The United States Forest Service, Department of Agriculture had no jurisdiction or authority over defendants' mining claims or mining methods under 30 U.S.C. 612.

Your petitioners file their Petition for Writ of Certiorari within 90 days from July 9, 1979, when their Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit.

QUESTION PRESENTED

Whether a permanent injunction prohibiting bulldozing and blasting and grant of money judgment for the U.S. Forest Service, Department of Agriculture, were appropriate under 30 USC 612, where defendants dug two trenches by bulldozing and blasting and extracted and mined therefrom some 30 tons of copper ore from their perfected and valid mining claims, and where the money judgment awarded to Forestry for its costs plus profit for filling and destroying defendants' mine was entered without hearing and proof of reasonableness.

STATUTE IN PERTINENT PART

30 U.S.C.612(b); Reservation in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land; Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger

or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto; . . .
(30 U.S.C. 612 is set forth in its entirety in the Appendix A-12.)

STATEMENT OF THE CASE

Between 1970, when petitioners located lode claims for copper in Skamania County, Washington, on national forest land open to mineral entry, and 1973, when the Forest Service stopped their operation, petitioners worked diligently and expended some $40,000 in development. On one area, Richardson dug a trench approximately 75 x 65 x 12 feet deep, an excavation of some 685 cubic yards. In another area, he dug a second trench approximately 300 x 80 to 100 feet wide and 15 feet deep, an excavation of approximately 1,375 cubic feet. (R 25). He winched copper ore out of the pit and stockpiled it in approximately 155 barrels (Tr 157) before the U.S. Forest Service filed action in the name of the United States in 1973 to permanently enjoin petitioners from working their mining claim by bulldozing and blasting.

The District Court rejected the Government's claim for money damages for alleged removal of timber and alleged damage to a stream and a road. A-23, A-24. The evidence showed that Richardson's trenching was exposing a large deposit of low-grade copper ore, which the Government's expert, Dr. Grant, and Mr. Moore, forestry engineers, recognized would be of interest to a large mining company. Ex 26, R 138.

The validity of the mining claims was not at issue. A-20. No contention was offered that petitioners ever attempted or intended to make use of the mining claims or surface resources thereon for any non-mining purpose. The Government admitted as an Agreed Fact in the Pretrial Order that petitioners "are lawfully in possession of said claims and have the right to explore, develop and exploit the same..." (R 25).

The objective of Forestry's case was to forbid Richardson from working his mining claims by digging holes in the ground. The courts below enjoined the Richardsons permanently from blasting and bulldozing to conduct their mining activities and awarded to the Forest Service a money judgment to cover its cost, plus profit, for filling in Richardson's mine workings, which would prevent him from extracting any more ore.

REASONS FOR GRANTING WRIT OF CERTIORARI

This is a case of first impression. A-7. It involves an important question of federal law which has not been, and which should be, settled by this Court. The unprecedented decision below reverses the meaning of the mining law, 30 USC 612. The decision below grants to the Forest Service power which Congress had withheld.

The Surface Resources Act of July 23, 1955, 30 U.S.C. 612(b), makes unpatented mining claims subject to the right of the Government "to manage and dispose of the

vegetative resources and to manage other surface resources thereof, except mineral deposits subject to location under the mining laws of the United States." Moreover, it provides: "That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations, or uses reasonably incident thereto." [pp. 3-4 supra, A-12].

Since mineral deposits are expressly excluded from management by the United States or its agencies, there is nothing in the Act which would restrict the locators from prospecting or mining their mineral deposit by bulldozing and blasting.

The District Court said: "This court need only determine whether defendants have violated that statute [30 U.S.C. 612]. A-30. He found that defendants exposed and extracted copper ore by means of bulldozing and blasting on their mining claims and thereby violated 30 U.S.C. 612. The Court of Appeals affirmed, saying, "The Surface Resources Act of July 23, 1955 ... must be relied upon to uphold the decree of the District court." A-8. The courts below misinterpreted the very section which Congress put into the statute to protect mine locators from interference by government agencies with "prospecting, mining or processing operations or uses reasonably incident thereto." The courts twisted the meaning of "uses reasonably incidental thereto"[i.e. to prospecting or mining], words which protect the miners' right to perform acts related to mining, into a restriction of the miners' choice

of mining methods to such as forestry agents are willing to deem reasonable. This judicial legislation reverses the meaning of the mining law and places Forest Service agents in position to dictate the management of the miners' prospecting, mining or prospecting operations, contrary to the intention of Congress.

The Senate Committee rejected Mr. Woozely's suggestion in his testimony that restrictions be made on bulldozing for doing assessment work or for prospecting or exploring for an ore body which had not yet been discovered. Committee on Interior and Insular Affairs hearing on S-1713, S. Rept. No. 554, 84th Cong. 1st Sess. 1955, pp. 65, 66 A-16.

House Report No. 730, U.S.Code, Cong. & Admin. News, 1955 pp. 2482-3, relating to the bill that was actually enacted, explains the congressional intention that Section 612(b) should protect the miner from agency interference with his prospecting and mining operations.

> "With respect to the reservations in the United States to use of the surface and surface resources as set out in the two preceding paragraphs, attention is called to the proviso which qualifies them:
>
> '...any use of the surface of such mining claim by the United States, its permittees, or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.'
>
> This language, carefully developed, emphasizes the committee's insis-

tence that this legislation not have the effect of modifying long-standing essential rights springing from location of a mining claim. Dominant and primary use of the locations hereafter made as in the past would be vested first in the locator; the United States would be authorized to manage and dispose of the surface resources, or to use the surface for access to adjacent lands, so long as and to the extent that these activities do not endanger or materially interfere with mining or related operations or activities on the mining claim." [Emphasis added.]

The only restriction created by 30 U.S.C. 612 is the restriction on the locator's use of surface resources not related to mining or related activities. House Report No. 730 continues:

"Subsection (c) of Section 4 of the bill specifically imposes restrictions on the locator's use of surface resources not related to mining or related activities.

"It prohibits removal or use, by the mining claimant, of timber or other surface resources made subject by subsection (b) of section 4 to management and disposition by the United States; again it will be noted:

'Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the

> construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States * * *.'"

This legislative history shows that Congress had no notion of setting up Foestry as the arbiter of mining practices on located claims. To the contrary, House Report at page 2479 shows that Congress wished to prevent "continual interference by Federal agencies" which would "hamber and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800."

Congress carefully refrained from giving federal agencies any authority to dictate prospecting or mining methods by the Surface Resources Act. The restrictions enacted were not upon methods of operating mining claims but the Act restricts the Government from interfering with the miners' operations.

The Government admitted as an agreed fact in the pretrial order that petitioners "are lawfully in possession of said claim and have the right to explore, develop and exploit the same..." R 25. Thus the Government concedes that the mining claimants had discovered on their claims on lands open to mineral entry "valuable mineral deposits" within the meaning of 30 USC 22. There was no challenge as to the quantity or quality of the copper ore discovered. Validity of the claims was conceded. R 25.

Validity of the claims having been conceded, validity necessarily includes the discovery of "valuable mineral deposits". Here, petitioners were not prospecting or exploring to search for valuable mineral deposits which had not been discovered, nor were they doing merely assessment work. Petitioners had discovered a valuable deposit and were engaged in the development and extraction of ore from this discovered deposit. Richardson was extracting and stock piling ore in some 155 barrels. Tr 157 (Grant). See distinction between "exploration" and "development" in Converse v. Udall, 399 F2d 616 (9th Cir. 1967).

The claims in question have been perfected. They are property in the highest sense of the term. Locators' rights are constitutionally protected property, and the locator may not be deprived of his claim without just compensation being made. Wilbur v. United States ex rel. Krushnic, 280 U.S. 306 (1930); United States v. North American Transportation and Trading Company, 253 U.S. 330 (1920). For the nature of mining claims and the rights conferred upon locators under the mining law, see discussion in Silver Bow Mining and Milling Company v. Clark, 9 Pac. 570, 574, 576, quoted with approval in Mantle v. Noyes, 9 Pac. 856 at 862, aff'd Noyes v. Mantle, 127 U.S. 348 (1888). See also Union Oil Co. v. Smith, 249 U.S. 337, 348, 349 (1919); Gwillim v. Donnellan, 115 U.S. 45, 49, 50. (1885).

This case is important to the mining industry, for the decision below interprets 30 U.S.C. 612 as giving power to bureaucracy to close down all surface mining and as creating liability for the miners. The decision makes miners liable to pay the bureaucracy's cost of filling up their mines if miners blast and bulldoze the ground. The decision grants to the bureaucracy power to shut down all the open pit copper mines of the nation, all of which mine by bulldozing and blasting. Surface or open pit mining accounts for 83% of the copper and 86% of all ores mined in the United States in 1968. Mineral Facts and Problems, published by the Bureau of Mines, U.S. Department of the Interior, 1970 ed. p. 538.

The Opinions below disregard the fact that in 1973 the Forest Service had no authority to decide whether defendants' methods of working their claims were or were not suitable. The decisions read into the 1955 Act the prohibition of undue and unnecessary degradation of the aesthetic and scenic values of the environment which Congress did not enact until 1976, long after this case arose.

The Act creating the national forest system, the Organic Administration Act of 1897, specifically provides that nothing in the act shall interfere with the operation of the mining laws:

> "[Any] mineral lands in any national forest...subject to entry under the existing mining laws of the United States and the rules and regulations

> applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions contained in Sections 473-482 and 551 of this [Act]." 16 U.S.C. §482 (1970)] (emphasis added.)

The Opinion below is in error when it states that "Since 1897 the Secretary of Agriculture has had authority under sections 478 and 551 of Title 16 to promulgate regulations concerning the methods of prospecting and mining in national forests." The Opinion misreads the 1897 Act. Title 16, §551 relates to preservation of the forests against destruction by fire or unauthorized logging. §478 does not say that the Secretary of Agriculture may regulate mining methods; it protects the continuing right of miners to enter the national forests. If Congress had intended then for the Secretary of Agriculture to have authority to regulate and prescribe the mining methods to be used for developing mineral resources, Congress would have said so.

The Opinion views this case as an occupancy trespass case where mining claims have been used for purposes other than mining, such as operating a saloon in United States v. Rizinelli, 182 Fed 675 (D. Idaho 1910), cutting and exporting timber in Teller v. United States, 113 Fed 273 (8th Cir. 1901), using a mining claim for a residence, in United States v. Nogueira, 403 F2d 816 (9th Cir. 1968), grazing cattle in United States v. Etcheverry, 230 F2d 193 (10th Cir. 1956), taking a non-locatable mineral in United States v. Toole, 224 F Supp 440 (D. Mont. 1963), or closing access to multiple users in

United States v. Curtis-Nevada Mines, Inc., 415 F Supp 1383 (E.D. Cal. 1976).

Petitioners could not have been trespassers, for the Government stipulated that they were lawfully in possession of their claims and had the right to explore, develop and exploit them. R25. The only use made of the claims by petitioners was to conduct the mining authorized by the mining law. They did not convert or take anything to which they were not entitled.

The 9th Circuit ignored the issue made of the impropriety of the award to Forestry of a money judgment requiring petitioners to pay for filling in their mine workings, which would prevent further extraction of ore. After the trial, Forestry personnel submitted to the trial court its estimate of $2,263.13 (R 58-A) to fill up petitioner's trench and mine shaft in Area B. In this estimate, Forestry included 15% profit for Forestry and 30% for overhead. Petitioners were not granted a hearing on this post-trial issue, and there was no evidence of reasonableness of these charges to support the money judgment of $2,263.13 entered by the District Court and tacitly upheld by the 9th Circuit.

Forestry is a statutory administrative agency and is governed strictly by the statute from which it derives its existence. Mr. Justice Douglas has made clear the importance of strict requirement for administrative action. He said in New York v. U.S. I. C.C. et al., 342 U.S. 882:

"Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

Senator Hruska, the ranking member on the Senate Judiciary Committee, and former Chairman of the Subcommittee on Administrative Practice and Procedure, said on the floor of the Senate, February 19, 1974 : (Congressional Record Senate 1911):

"Power alters the prespective of the persons who wield it, and particularly where agencies administer large areas of public resources, there is a tendency to create and enlarge a Federal empire which is inside the 50 States but really independent of them.

"The temptation to consolidate that empire by dispossessing citizens of property rights lawfully acquired under acts of Congress is a strong one. To a zealous bureaucrat, the project may appear a righteous crusade, while the citizen screams 'Confiscation!' The task of preserving our kind of country, one where a citizen's constitutional rights are a reality, so that it will not turn into a bureaucracy where those rights have no meaning, calls for the courts to check and correct administrative abuse of power."

In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the Supreme Court said at page 213:

> "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." ' quoting Manhattan General Equipment Co. v.Commissioner, 297 U.S. 129, 134 (1936). Thus despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted to the Commission by Congress under §10 (b)."

In Ernst & Ernst, an agency was checked by this Court in its efforts to enlarge the effect of the statute by administrative interpretation. Similarly, this Court should check Forestry's attempt here to expand its power beyond that intended by Congress.

Chief Justice Holmes said concerning constitutionally protected vested rights: "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393.

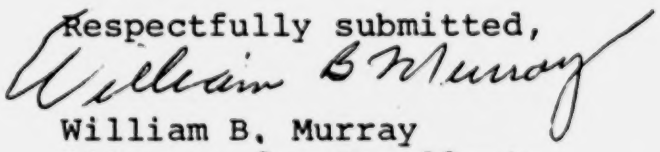
Since World War II, copper has gone up in price from 14 cents a pound to over $1 a pound. Overregulation causes shortages of supplies. It destroys economic

freedom. William E. Simon, economist and former Secretary of the Treasury of the United States, "A Time for Truth", endorsed by Nobel prize winning economists Milton Freeman and F. A. Hayck, McGraw Hill, New York 1978.

There is little good in protecting the environment for the sake of a society which fails to insist on fair treatment for its citizens.

WHEREFORE, your petitioners pray that this Honorable Court grant their petition for writ of certiorari, consider their case, and reverse the injunction and money judgement affirmed below.

Respectfully submitted,



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INDEX TO APPENDIX

	Page
Order denying Petition for Rehearing, U.S. Court of Appeals July 9, 1979	A-1
Opinion of Court of Appeals May 11, 1979	A-2
30 U.S.C. §612	A-12
16 U.S.C. §551	A-14
16 U.S.C. §478	A-15
43 C.F.R. §3712.1	A-15
Testimony, Committee on Interior and Insular Affairs hearing on S-1713, S. Rept. No. 554, 84th Congress, 1st Session, 1955, pages 65, 66	A-16
U.S. District Court for Oregon Findings of Fact and Conclusions of Law March 7, 1977 Opinion	A-19
U.S. District Court for Oregon Final Judgment and Decree May 25, 1977	A-36

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 77-2580
v.	)	O R D E R
NED N. RICHARDSON and DOROTHY M. RICHARDSON, husband and wife, Defendants-Appellants.	)	[July 9, 1979]

Before: WRIGHT and GOODWIN, Circuit Judges and THOMPSON, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. The circuit judges have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No.
Plaintiff-Appellee,	)	77-2580
	)	
vs.	)	OPINION
	)	
NED N. RICHARDSON and DOROTHY M. RICHARDSON, husband and wife,	)	
	)	
	)	
Defendants-Appellants.	)	
	)	

[May 11, 1979]

Appeal from the United States District Court for the District of Oregon

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Before: WRIGHT and GOODWIN, Circuit Judges, and THOMPSON *, District Judge

THOMPSON, District Judge:

Some form of poetic justice may lie in the fact that this action arose in the Gifford Pinchot National Forest in the State of Washington, named for a man who was in the vanguard of conservationists and environmentalists.

In 1970 the appellants, Ned and Dorothy Richardson, filed notices of location for six mining claims in the Wind

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*The Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

River Ranger District. The claims were situated at the confluence of Slide Creek and the East Fork of the Lewis River, an area reforested after a destructive fire some forty years ago. The area was heavily used by campers and fishermen.

Appellants explored and prospected their claims by use of heavy equipment (a bulldozer and a backhoe) and by blasting. Surface disturbance by bulldozing of three separate areas affected approximately 1.6 acres. Two trenches were excavated, one approximately 75 feet by 65 feet by twelve feet deep; the other approximately 300 feet by 100 feet by 15 feet deep. From the early days of these activities forest rangers remonstrated with the Richardsons respecting the excessive and unnecessary surface and environmental damage caused by their methods of prospecting and suggested core drilling as an alternative, but the suggestions were not heeded. Ultimately this action was filed to enjoin further blasting and bulldozing and to restore surface damage.

To place this case in proper perspective it should be said that these were genuine prospecting activities conducted at considerable expense (some $40,000) for the purpose of developing a mine. The Richardsons used the methods they deemed best for the purpose of removing the overburden and uncovering the ore body. Inasmuch as the prospect was, at best, a low grade copper deposit, it was essential to demonstrate the existence of a large body of ore for commercially feasible mining. The report of the government's own expert geologist

states: "The prospect does justify continued exploration which should be designed to indicate the presence of commercial grade ore..." The report also stated:

> "The goal of a successful exploration effort on a deposit such as this will be to delineate sufficiently large tonnages of 0.6 - 0.8% copper equivalent rock which would be amenable to open pit or block caving mining methods. Using the above grades as one economic parameter, a minimum size deposit of 30,000,000 tons would justify probable production at 5,000 to 7,500 TPD. This size deposit would represent a volume block of 330,000,000 cu. ft. or 1,000' x 1,000' x 330' basic dimensions. The only acceptable initial approach to exploration of this type deposit would be core drilling after performance of all applicable surface geotechnical surveys. Small area excavations are virtually meaningless for this type of problem. Furthermore, the large tonnage minimum production rate requirement for ore of concentrator quality indicates that small-scale production is totally economically unacceptable. The ASARCO smelter in Tacoma would not accept the low-grade raw ore; only clean contract-stipulated concentrates and/or adequate flux to meet their environmental quality standards."

Following a court trial during which the district judge viewed the premises, the Court entered its decree and found:

"1. This Court has jurisdiction by virtue of 28 U.S.C. §1345.

"2. Stripping away overburden to expose rockbed, particularly in the initial exploration stages, is not proper mining procedure, under the circumstances shown by the evidence in this case.

"3. Defendants' utilization of blasting and bulldozing was destructive to the surface resources and consequently not a reasonable method of exposing subsurface deposits under the circumstances shown by the evidence in this case.

"4. Under the circumstances shown by the evidence in this case, the Forest Service may require the locator or an unpatented mining claim on national forest lands to use non-destructive methods of prospecting.

"5. Defendants and their successors and agents, servants, employees and attorneys, and those persons in active concert or participation with them are permanently enjoined from conducting prospecting operations by means of bulldozing or blasting on the following mining claims located in Sections 7, 8, 15, 17, 18 and 20, Township 4 North, Range 5 E.W.M., in Skamania County, Washington: Half Penny, Silver Lode No. 1, Big Twinkle Mine, Richardson Lodge Claim, Richardson Little Twinkle Mine, and Lucky Strike.

"Plaintiff shall have judgment against defendants Ned N. Richardson and Dorothy M. Richardson jointly and severally in the amount of $2,263.13 plus its costs and disbursements herein."

This case involves the interrelationship of federal statutes concerning the national forests and mining on public lands. These are 30 U.S.C. §26, 30 U.S.C. §612 [1] 16 U.S.C. §5551,[2] and 16 U.S.C. §478.[3] Since 1897 the Secretary of Agriculture has had authority under sections 478 and 551 of Title 16 to promulgate regulations concerning the methods of prospecting and mining in national forests; yet it was not until 1974 that such regulations were adopted. (35 C.R.T. Part 252). No such regulations were in effect before this lawsuit was commenced in November, 1973 and the forest rangers relied on certain directives and guidelines issued by the department and upon 30 U.S.C §612 for their authority to restrain the unwarranted surface destruction of the national forest.

The basic mining law of May 12, 1872 (17 Stat. 91) granted a locator broad possessory rights. "The locators of all mining locations...shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations..." (30 U.S.C. §26). Before 1955 this broad grant was consistently recognized so long as the uses were incident to prospecting and mining. In United States v. Rizzinelli, 182 Fed 675 (D. Idaho 1910), the establishment and maintenance of saloons on an unpatented mining claim in the

forest reserve was held to be an indictable offense. The court said:

> "The paramount ownership being in the government, and it also having a reversionary interest in the possessory right of the locator, clearly has a valuable estate which it is entitled to protect against waste and unlawful use."

Also, in Teller v. United States, 113 Fed. 273 (8th Cir. 1901), the defendant was convicted of unlawfully cutting and exporting timber from public lands of the United States, including from an unpatented mining claim. Upholding the conviction, the Court of Appeals said, in part:

> "While his location so far segregated and withdrew the land from the public domain that no rival claimant could successfully initiate any right to it until his location was avoided and his entry was canceled (James v. Iron Co., 46 C.C.A. 476, 107 Fed 597, 603, and cases there cited; Hatman v. Watten, 22 C.C.A. 30, 76 Fed 157, 160; Pacific Ry. Co. v. Dunmeyer, 113 U.S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122), it gave him nothing but ' the right of present and exclusive possession for the purpose of mining. It did not divest the legal title of the United States, or impair its right to protect the land and its product by either civil or criminal proceedings, from trespass or waste."

The foregoing statement was quoted with approval by our court in United States v.

Nogueira, 403 F2d 816 (9th Cir. 1968) where we upheld the right of the United States to seek to enjoin the use of an unpatented mining claim for a residence wholly unrelated to any mining activity whatsoever. Similarly, in United States v. Etcheverry,230 F2d 193 (10th Cir. 1956), the owner of unpatented mining claims was held not entitled to lease the claims for grazing of livestock - a use unrelated to mining. See also: United States v. Schultz, 31 F2d 763 (N.D.Cal. 1929).

It perhaps is not surprising that the reported cases to this date concerning the surface use of unpatented mining locations have treated only the issue of uses unrelated to prospecting and mining. This is true even of the precedents since 1955, after the passage of the Surface Resources Act of 1955, 69 Stat. 367, and particularly 30 U.S.C. §612 (supra). Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd 399 F2d 616 (9th Cir. 1967), cert. den. 393 U.S. 1025 (1969), arose out of an administrative action by the Secretary against locators to establish control of the surface resources (timber) on unpatented mining claims. In United States v. Toole,224 F. Supp. 440 (D. Mont. 1963) the United States brought an action to cancel mining locations and obtain damages for trespass. The court held that a deposit of peaty material or peat moss was not a valuable mineral locatable under the mining laws and awarded damages under 30 U.S.C.§612 to the United States for the material removed. The case of United States v. Curtis-Nevada Mines, Inc., 415 F. Supp. 1373 (E. D. Cal. 1976) involved the surface use of

unpatented mining claims located both in the national forest under the jurisdiction of the Department of Agriculture, and on public lands under the jurisdiction of the Department of the Interior. The court required the defendant to file an operations plan for the unpatented claims located in the national forest pursuant to 36 C.R.R. Part 252, but not for the claims on lands under the jurisdiction of the Bureau of Land Management which had promulgated no similar regulation. The court also enjoined the defendant from prohibiting or interfereing with public use of the surface of the claim for hunting, hiking, camping and recreational activities "so long as there is no interference with ongoing mining operations."

The Surface Resources Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. §611 et seq. (Footnote 1), must be relied upon to uphold the decree of the District Court in the present case. The year following its enactment, the Secretary of the Interior promulgated regulations (21 F.R. §7619, 43 C.F.R. §185.120 et seq.). Section 185.122 of the regulations (now renumbered and found as 43 C.F.R. §3712.1)[4/] sets forth the Secretary's interpretation of the statute in relation to the surface use of unpatented mining claims on public lands under the jurisdiction of the BLM. A fair reading of this regulation must lead to the conclusions that insofar as BLM lands are involved, any activity is permissible which is directly related to mining or prospecting.

These regulations do not, however apply to national forest lands under the jurisdiction of the Secretary of Agriculture and in the instant case we look to Title 30 U.S.C. §612 unaided and unimpeded by administrative regulation. The court observed in Curtis-Nevada Mines, Inc., (supra) that the statute is ambiguous and we must look to legislative history for aid in interpretation.

Testimony taken in hearings before the Committee on Interior and Insular Affairs on §1713, a bill whose language was identical to that adopted as 30 U.S.C. §612, indicates that the Congress was aware of the problem of excessive bulldozing. 5/

Further, in commenting on section 4(c) of 69 Stat. 368 (30 U.S.C. §612), the House Committee considering the bill stated:

> "This language, read together with the entire section, emphasizes recognition of the dominant right to use in the locator but strikes a balance in the view of the committee, between competing surface uses and surface versus subsurface uses."

Section 612 speaks of "prospecting", "mining" and uses "reasonably incident thereto." It speaks of "the right of the United States to manage and dispose of the vegetative resources thereof and to manage other surface resources thereof." It limits such control so "as not to endanger or materially interfere with prospecting, mining... or uses reasonably

incident thereto." It also in subsection (c) precludes the exploitation of surface resources by a locator "except to the extent required for... prospecting, mining...and uses reasonably incident thereto. (Emphasis suppliedO. Bearing in mind that this admittedly ambiguous restatement of the rights of mining locators was intended to supersede and modify the pre-existing recognition of broad rights under 30 U.S.C.§26 (discussed supra), we think the words we have underlined in the quoted extracts from the statute are the ones that point the direction of the changes intended. The findings of fact by the District Court implement a correct interpretation of the statute, are supported by the evidence, and cannot be faulted under the standard prescribed by Rule 52(a) Fed. R. Civ. P.

Congressional policy as expressed in the National Environmental Policy Act of 1969 is also consistent with this dispositon.[6/]

In summary, we suggest that each case of this kind is controlled by the facts of each particular case. The District Court in its findings emphasized and reiterated the "circumstances shown by the evidence in this case." Here the locators did not have a mine, they had a prospect, they were still exploring. Their methods of exploration were unnecessary and were unreasonably destructive of surface resources and damaging to the environment. They were warned and persisted. The judgment of the District Court is affirmed.

FOOTNOTES

1/ 30 U.S.C. §612: Unpatented mining claims.

(a) Prospecting, mining or processing operations.

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land; Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him

from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use and distribution of ground or surface waters within any unpatented mining claim.

(c) Severance or removal of timber

Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the

United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

2/ 16 U.S.C. §551: Protection of national forests; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401 (b) to (e) of Title 18.

3/ 16 U.S. C. §478: Egress or ingress of actual settlers; prospecting

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

4/ 43 C.F.R. §3712.1:

. . .

(b) The locator of an unpatented mining claim subject to the act is limited in his use of the claim to those uses specified in the act, namely, prospecting, mining or processing operations and uses reasonably incident thereto. He is forbidden to use it for any other purpose such, for example, as for filling stations, curio shops, cafes, tourist or fishing and hunting camps. Except as such interference may result from uses permitted under the act, the locator of an unpatented mining claim subject to the act may not interfere with the right of the United States to manage the vegetative and other surface resources of the

land, or use it so as to block access to or egress from adjacent public land, or use Federal timber for purposes other than those permitted under the act, or block access to water needed in grazing use of the national forests or other public lands, or block access to recreational areas, or prevent agents of the Federal Government from crossing the locator's claim in order to reach adjacent land for purposes of managing wildgame habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on located and on adjacent lands.

5/ Testimony taken in hearings before the Committee on Interior and Insular Affairs on S 1713:

MR. WOOZLEY. Under present uses, I feel very definitely that some people are taking advantage of using the surface rights for purposes not incident actually to mining.

SENATOR MILLIKIN. Give me examples.

MR. WOOZLEY. They are stripping the land in certain areas much more than is necessary for their actual mining operations, destroying the topsoil and allowing the wind to blow the land around.

. . . . . .

SENATOR ANDERSON... We are having an epidemic of bad erosion practices by taking the bulldozers and just promiscuously running them across the landscape.

SENATOR MALONE. Do you mean, Mr. Woozley, that there is a great percentage of the area of these lands that is being bulldozed in that connection?

MR. WOOZLEY. There is sufficient, Senator, when you dig a hole on each claim or use a bulldozer on each claim, that it is setting up a terrific erosion problem. The Federal Government and the people using the range are spending money to build and vegetate these ranges, and, on the other hand, they are being abused.

SENATOR MALONE. Would you stop all this?

MR. WOOZLEY. We would have a much better chance of stopping that under this act than uder the existing laws.

SENATOR MALONE. I ask you, would you attempt to stop it? Do you want to stop it?

MR. WOOZLEY. We would stop the uses which are not necessary to exploration.

SENATOR MALONE. What is he using the bulldozer for? Is it not to find out what is underneath?

MR. WOOZLEY. That is very questionable. It is just to do his assessment work, his necessary work. I do not think it is doing anything to determine what minerals are there, Senator.

SENATOR MALONE. Are we not then amending the wrong law?

. . . . . .

MR. WOOZLEY. No. I think this law would do that. (Testimony of Mr. Woozley, Director of the Bureau of Land Management. page 65).

6/ The National Environmental Policy Act of 1969 (NEPA) also indicated that the Congress intended the various agencies of government to take a greater interest in environmental problems. NEPA provides in part:

> "The Congress authorizes and directs that to the fullest extent possible (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policy set forth in this Act..." 43 U.S.C. §4321.

These policies as set forth in 42 U.S.C. §4321 et seq. include a duty to:

> "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
>
> "(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
>
> "(3) attain the widest range of beneficial uses of the environment without degradation risk to health or safety or other undesirable and unintended consequences...
>
> "The Congress recognizes that each person should enjoy a healthful environment and each person has

a responsibility to contribute to the preservation and enhancement of the environment."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil No.
	)	73-895
vs.	)	
	)	
NED N. RICHARDSON and DOROTHY M. RICHARDSON, husband and wife,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendants.	)	[March 7, 1977]

This case came on for trial on March 31, 1975 before the court without a jury, the Honorable James M. Burns presiding. The issues were duly tried and the court rendered its oral decision

IT IS ORDERED AND ADJUDGED that the court's oral ruling, which has been transcribed and is attached hereto, is incorporated by reference herein and shall constitute findings of fact and conclusions of law pursuant to Rule 52 FRCP.

Dated this 7 day of March, 1977.

/s/ James M. Burns
United States District Judge

COURT's OPINIONS

BEFORE:
The Honorable James M. Burns, United States District Court Judge.

APPEARANCES:
Mr. Jack Collins, Assistant United States Attorney, representing the Government;
Mr. William B. Murray, Attorney, representing the defendants.

THE COURT: U.S. v. Richardson.

In this case, the Government is seeking to enjoin the defendants from prospecting on Forest Service land in a manner which the Government claims is unreasonable and which it claims has resulted in destriction of various environmental and scenic values on the lands affected.

The validity of the mining claim itself is not at issue. Specifically, the Government seeks relief by way of an injunction forbidding defendants from blasting, bulldozing, and otherwise acting in an unreasonable manner.

The Government also requests an injunction requiring defendants to restore certain of the areas to their previous condition. And the Government in addition asks for an award of damages as well, based upon its claim that it would suffer monetary damages by virtue of timber removal.

The case was tried to the Court over the defendants' objection. Defendants contending that they were entitled to a jury trial.

The testimony was taken and it was agreed by all concerned that a view of the premises might be helpful. And in this regard I should state that I am going to omit largely a description of the specific components of the claim as far as location with respect to trails, roads and geographical points. And I am going to omit a historical description of the sequence of the events because these are not really in dispute. The times when the claims are commenced and the like and they are set forth rather clearly in the exhibits; largely the exhibits of the memos by the Forest Service personnel and I think it's unnecessary to extend the length of this oral opinion for that purpose.

The view was scheduled for early May of 1975. A group of us traveled to the site of the claim. In the group there was Mr. Moore of the Forest Service, Mr. Collins of the U.S. Attorney's Office who was filling in for Mr. Hammersly who tried the case, Mr. Mike Moran, who had appeared earlier as a witness, geological expert witness for the defendants, and Mr. Carl Crain, then a law student who was acting as an intern and clerk for me.

At the site we met Dr. Grant who was plaintiff's geologist that testified at the trial.

The view occupied about three quarters of an hour during which time all of us inspected each of the four areas discussed at the trial, A, B, C, D. In addition, certain conversations were had with both Dr. Grant and Mr. Moran con-

cerning various objects and conditions pointed out at the site of the mining claim.

Mr. Murray, who tried the case for the defendants, asked to be excused from attendance at this view because of a conflict in his schedule. But I wish to make it clear that insofar as there was any questioning which went on, it was simply questions asked of Mr. Moran and Dr. Grant as to specific areas and locations and the like. There was no testimony taken in the sense that is normally thought of.

As to Area D where the claim was made that damage occurred by virtue of defendant drilling, very little needs to be given to this. This was a site at the westernly most portion of the premises where minimal damage occurred in the bank at the site opposite of the east fork of the Lewis River. The bank abuts the road as the road immediately abuts the river. Some material slid down onto the road and some material was moved over on the river side of the road. Any of the material that had come in contact with the stream had, of course, long since washed away. Any relief, if any, to which the Government would be entitled in this area would simply be any further drilling activity at that particular site should occur only after appropriate consultation with the Forest Service so as to insure against future damage to the road itself or to any fill material spilling over into the river.

It is apparent that given the superb cleanliness of the stream, whatever inter-

ference there was at the time has long since vanished and the damage was minimal and short-lasting.

Area A, the site nearest Slide Creek and adjacent to the cabin is not presently being worked and need not detain us further.

Area C and B are according to the view the serious incursions upon the landscape. Each reveals substantial removal of vegetation or top soil. The top soil being minimal in the area because of the underlying geography.

Site B consists of an area about seven-tenths of an acre near the bank of the east fork of the Lewis River. It contains two holes drilled approximately twenty feet deep near the center of the excavation. The general excavation reveals as much as five, six feet of the ground was bulldozed off. It is a ugly scar on the landscape indeed.

Area C is a bulldozing area near an old Forest Service road that travels generally in a northerly direction on the east side of Slide Creek. A smaller area is involved here. But the huge and ugly gash left near the edge of the road extended perhaps one hundred feet in length and as much as eight to ten feet in depth and about twelve feet in width. I conclude that the method used in Areas B and C are grossly inappropriate as the way to and in which to pursue otherwise a valid prospective claim.

I am persuaded by the Government's evidence that core drilling would be much more appropriate and, indeed, would be

more efficient and less expensive. It would result in minimal disruption of the forest land area and keep that location as attractive as it is to those who visit our forest land for scenic, environmental and esthetic enjoyment.

The Government claimed destruction of timber at Area C by virtue of spilling some of the excavation material over on the bank and burying some tree trunks with as much as perhaps three, four feet of fill dirt. I conclude, based largely on my view of the premises, that the damage to trees in this area which the Government assets has not been proved--similarly with respect to timber which has been removed from Area B, the Government introduced evidence from a timber specialist purporting to establish a dollar value of timber removed.

I conclude that the Government has failed needed burden of proof in this respect and hence its claim for money damages for removal of timber has not been met.

Throughout their numerous discussions with the defendants, Forest Service personnel advocated the use of core drilling or some other method of prospecting which would reveal the same or superior information while causing less destruction to other resources and the esthetic appearances of the area. During the past several decades, alternatives to blasting and bulldozing, such as core drilling, have enjoyed the benefits of technological advancement. It is now possible to explore land containing large low grade subsurface deposits without disturbing the overlying soil or vegetation or with-

out disturbing all but a small part of it. The use of something like a core drill would have provided defendants with more information in less time at less expense than the environmentally destructive methods which they were using. These nondestructive methods of prospecting have so completely outmoded defendants' methods, used by the defendant, that I find and conclude it is no longer standard procedure to strip away the overburden to expose the bed rock, especially during the initial exploration stage in which defendants were engaged.

In light of modern environmental concerns for proper surface drainage, prevention of erosion, and the esthetic appearance of our National Forest lands, the removal of overburden in this destructive manner is grossly inappropriate. Therefore, I find and conclude and hold that defendants' utilization of blasting and bulldozing was unreasonable, directly in Areas C and B, was unreasonable under the circumstances.

Having so concluded, I must now determine whether the Forest Service has the authority to regulate prospecting methods within the National Forest. Since this question tends to be, perhaps if not a first impression almost a first impression, it perhaps will be helpful to trace the power that controls such activities on public lands from its Constitutional source.

The Constitution provides that Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other

property belonging to the United States. In mentioning what I did a few minutes ago, I intended to omit citations not only to cases but the Constitutional provisions as well. Though I mention that is from Article IV, Sec. 3.

This grant of Constitutional authority enables Congress to exercise unlimited legislative power over the public domain and to limit the disposition of that domain to a manner consistent with its use of public policy. Alabama v. Texas, United States v. City and County of San Francisco. It also enables Congress to control, in the same manner as any individual proprietor, the use of public lands, prevent the waste thereon of valuable public resources, abate nuisances and exercise all of the other property rights which are normally afforded to private individuals. Alabama v. Texas, Fred Light v. United States, Camfield v. United States.

The needs of a young, rapidly expanding country first prompted Congress to exercise its power to dispose of natural resources. The act of May 10, 1872, was enacted to promote the development of the mining resources of the United States by encouraging private individuals to assume the hazards of searching for and extracting valuable minerals. United States Ex Rel U.S. Borax Company v. Ickes, United States v. Rizinelli. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase under regulations provided by law. 30 USC 22.

At that time the United States enjoyed a seemingly unlimited bounty of natural resources and the destruction of surface resources which accompanied uncontrolled mining activity was a slight burden to bear in relation to the benefits arising from continued national growth and westward expansion. However, it soon became apparent that our national resources were not unlimited and that steps would have to be taken to preserve those resources for future generations. Thus the act of March 3rd 1891, authorized the President of the United States to set apart and reserve certain public lands as National Forests.

The purpose of this act was to preserve the remaining forests on public lands from depredation and destruction through complete administration and control by the Government.

Through the act of June 4, 1897, Congress specifically defined the purposes for which National Forests were to be established under 16 USC 471. These were the improvements and protection of the forests within the boundaries of the National Forests, the preservation of favorable conditions for water flow, and the maintenance of a continuous supply of timber for the use of the people.

During the Twentieth Centure, the United States continued to grow in population although the geographical limits of the lower forty-eight states had been established. The urbanization of America made forest lands increasingly important for recreational activities.

Congress in response to the changing needs of the country, enacted the Multiple Use-Sustained Yield Act of 1960. [1955] Through this act outdoor recreation and the preservation of range, timber, watershed, wildlife and fish were added to the purposes for which a National Forest would be established.

Thus Congress, through the mining laws, has exercised its power to dispose of public property by encouraging the development, by private individuals, of mineral resources located on public lands. On the other hand, it has also exercised the power vis-a-vis public property too by authorizing the reservation of National Forests for the purpose of preserving the surface resources located within their boundaries. Since the development of mineral resources usually or sometimes is not compatible with the preservation of surface resources, one must explore the relationship between the rights conveyed under the mining laws and the restrictions imposed on users of the National Forest. It is clear that the entrance upon forest lands for any legal purposes including prospecting, locating and developing mineral resources is not prohibited. 16 USC 478. But, as previously noted, mineral deposits in lands belonging to the United States are only open to exploration and the lands in which they are found to occupation, to the extent that such activity is not prohibited. 16 USC 22.

The location of a valid mining claim bestows upon the locator the right to present possession for the purpose of prospecting and mining, but it does not divest the legal title of the United States or impair its right to protect the land

from trespass or waste. U.S. v. Etcheverry, United States v. Rizinelli, Teller v. United States. Those people who seek to locate, prospect and develop mineral resources on National Forest lands must comply with the rules and regulations covering the National Forest. 16 USC 478.

Before reaching the specific rules and regulations which apply in this present case, the Court should determine which Governmental agency has the authority to impose and enforce such rules and regulations. In order to effectuate the purposes behind reservation of public land as National Forest, Congress, through the Act of June 4, 1897, delegated to the Secretary of the Interior the authority to make rules and regulations. Subsequently, Congress determined that the Secretary of Agriculture could more effectively manage surface resources within National Forests. Consequently, the Act of February 1, 1905, this act transferred to the Secretary of Agriculture the foregoing authority along with that to execute all laws affecting public lands reserved under the provisons of 471, excepting certain lands as mentioned. 16 USC 472.

As a result of this later act, the Secretary of the Interior retained the authority to regulate the location of the mining claims, their nature and classes, assessments and mineral patent applications while the protection of nonmineral surface resources became the responsibility of the Secretary of Agriculture. This delegation of authority to the Secretary of Agriculture is a significant one and should be construed in a manner that will insure protection of the National

Forests. United States v. Shannon. Further, the valid location of a mining claim does not, in itself, withdraw the land embraced within the claim from the jurisdiction of the Secretary of Agriculture. United States v. Rizinelli. Therefore, the rules and regulations issued by the Secretary of Agriculture pursuant to 551 should be enforced by the courts as long as they tend to protect National Forest lands and faithfully preserve the interests of the people in those lands. As a part of the Department of Agriculture, the Forest Service may properly regulate the occupancy and use of the National Forests.

In this case, the Court need not be concerned with specific rules which may have been promulgated by the Forest Service because Congress, through the Multiple Surface Use Act of 1955, has taken action to define the respective rights of a prospector and the Government. This Court need only determine whether defendants have violated that statute. The Multiple Surface Use Act of 1955 is found at 30 USC 612.

In construing that separate provision of 612, this Court should give the statute, the most harmonious and comprehensive meaning possible in light of its legislative policy and purpose. The purpose of this section was to limit the use, or misuse, of surface resources by mining claimants prior to the issuance of a patent. Converse v. Udall.

A review of the legislative history of this section reveals a Congressional recognition of the need for a balancing between competing surface and

subsurface demands. This balancing process has become even more important since the passage of the National Environmental Policy Act of 1969, 42 USC 4331(a) and following.

Congress further affirmatively declared that each person has a responsibility to contribute to the preservation and enhancement of the environment. Subsection (c) 4331. To the fullest extent possible, the policies, regulations and public laws of the United States should be interpreted in accordance with the policies set forth in the National Environmental Policy Act. Therefore, this Court should avoid any decision which would frustrate the objectives of 4331.

In any situation involving several noncompatible and competing uses for a given parcel of land, a determination must be made regarding which of those uses, or which combination of uses, would result in the highest net social benefit. Obviously, in order to ascertain the parcel's value as mineral producing land, a certain amount of exploratory work must be done to establish its mineral content. Thus, an absolute prohibition on prospecting in a given parcel would require strong countervailing considerations.

But, the instant case does not involve such an absolute prohibition. Defendants were requested to use an alternatuve method of prospecting which would have lessened their activities' impact on environment and surface resources while producing superior information at a lower cost.

This Court has determined that defendants' destruction and removal of surface resources on the mining claim far exceeds that which was required to perform prospecting activites. Although traditional cases involving the unlawful use of mining claim differ from the present one in that they were concerned with the use of National Forest for obviously illegal activities such as operating a saloon in the Rizzinelli case, grazing cattle in the Etcheverry, or removing and selling timber in the Teller, case, the underlying nature of the issues they dealt with are the same, it seems to me, as those this Court now faces. The essence of those cases is the appropriation of valuable public resources for the use and benefit of private individuals.

In the present case, defendants have not sold any timber or grazed cattle. Or operated a saloon. They simply destroyed timber and other surface resources. However, as in the traditional cases, public resources have been converted for private benefit by a person who did not have the right to so convert them. The public has suffered the loss of these resources and defendants have derived, or thought they were deriving, an economic benefit in the form of reduced prospecting costs. Thus, the essence of both the traditional cases and the present one is the unlawful appropriation of public resources for private benefit.

In light of these broad concerns for the environmental impact of resource exploration, defendants responsibility to contribute to the preservation of the environment, and the provisions of 30 USC 612, it would be unreasonable to interpret

the latter act as permitting unrestrained and unnecessary surface destruction by a prospector on a mining claim. Therefore, this Court finds and holds that the Forest Service may properly require the locator of an unpatented mining claim to use non-destructive methods of prospecting when, as in the present case, the methods being used cause unnecessary or unreasonable destruction to surface resources and the environment in which they exist. In cases such as the present one, it cannot be said that this type of regulation by the Forest Service falls outside of its authority to manage the surface resources of a National Forest or that it endangers or materially inteferes with the locator's right to prospect his claim.

I am satisfied and persuaded that the Government is entitled to injunctive relief with respect to those areas involved insofar as the defendants would otherwise propose to continue their operations of a prospecting nature by blasting and bulldozing. These are clearly destructive of important forest values and in light of the evidence, unnecessary as well as being more expensive and simpler, less destructive alternative means. Accordingly, therefore, I propose to issue an injunction against defendants with respect to bulldozing and blasting. As may be jointly agreed upon by the parties themselves, subject to ratification by the Court. So I find and conclude that the plaintiff is entitled to a prohibitory injunction as prayed for.

The subject of the mandatory injunction demanding defendants to restore the

area is much more difficult. Among other things, this requires the Court to maintain some appropriate study and scrutiny in the matter over which the restoration occurs. Frankly, I simply do not have time to go out there and study that.

I conclude after much hesitation and weighing all of the equities carefully in exercising my broad discretion, which a Chancellor has in equity in granting injunctive relief, I conclude that such a restorative injunction is unnecessary except possibly at Site B. One of the problems, of course, with restoration at that site is the general absence of appropriate top soil in the immediate area. Bulldozing could achieve some restoration but to effect this change, it would bring about--but to effect the change which would bring about any pleasant visual aspect to the scene would necessarily require depositing considerable amounts of top soil over the restored area and this means that it has to be brought in over a considerable distance. I do not believe that a restorative injunction is appropriate for, certainly, not for Site A and D and not also for Site B. Under these circumstances, I exercise my discretion to withhold any granting of mandatory injunctive relief for a period of one hundred twenty days. During that time I urge the parties to attempt to work out a compromise solution whereby through their joint efforts reasonable quantities of soil may be obtained and deposited over area B in a cooperative fashion. If the parties are unable to agree during that period of time, then I will give further consideration to issuance of a

mandatory injunction of some sort with respect to restoration of Area B. Area B as in boy. I reject any requirement for a restorative injunctive relief with respect to the other three areas and I reject the claims of the Government with respect to award of monetary damages.

As previously mentioned, these remarks when transcribed will be treated as findings and conclusions pursuant to Rule 52.

I believe that concludes the matter here this morning.

MR. COLLINS: Would you like us to submit a final form of order?

THE COURT: I suggest with respect to the proposed form or order you wait until the transcript has been prepared and filed. And then I suggest you attempt to agree upon a proposed form of order covering everything but the mandatory injunctive phase with respect to Area B. If you can't work it out within one hundred twenty days, then I will have to see what remains.

Mr. Murray, could you work with Mr. Rifenberg and Mr. Collins in attempting to prepare a form of order?

MR. MURRAY: Yes. I can, Your Honor.

THE COURT: Thank you.

Defendants served and filed April 4, 1977, Defendants' Motion for Supplemental Findings of Fact, supported by Transcript references. R 52-54.

On May 25, 1977, the Court rejected these tendered findings and defendants' objections to the decree proposed by the Forest Service. R 56.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff,	Civil No. 73-895
v.	FINAL JUDGMENT AND DECREE
NED N. RICHARDSON and DOROTHY M. RICHARDSON, husband and wife, Defendants.	May 25, 1977

This Court has made and filed Findings of Fact and Conclusions of Law with respect to plaintiffs' Complaint for prohibitory injunction, restorative injunction and award of damages. A Final Judgment and Decree in accordance with this opinion is entered in favor of the plaintiff and against the defendants as follows:

IT IS ORDERED, ADJUDGED AND DECREED:

1. This Court has jurisdiction by virtue of 28 U.S.C. 1345.

2. Stripping away overburden to expose rockbed, particularly in the initial exploration stages, is not proper mining procedure, under the circumstances shown by the evidence in this case.

3. Defendants' utilization of blasting and bulldozing was destructive to the surface resources and consequently not a reasonable method of exposing subsurface deposits under the circumstances shown by the evidence in this case.

4. Under the circumstances shown by the evidence in this case, the Forest Service may require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting.

5. Defendants and their successors, and agents, servants, employees and attorneys, and those persons in active concert or participation with them, are permanently enjoined from conducting prospecting operations by means of bulldozing or blasting on the following mining claims located in Sections 7, 8, 15, 17, 18 and 20, Township 4 North, Range 5 E. W.M. in Skamania County, Washington. Half Penny, Silver Lode No. 1, Big Twinkle Mine, Richardson Lode Claim, Richardson Little Twinkle Mine, and Lucky Strike.

6. Plaintiff shall have judgment against defendants Ned N. Richardson and Dorothy M. Richardson jointly and severally in the amount of $2,263.13 plus its costs and disbursements herein.

Dated this 25th day of May, 1977.

/s/ James M. Burns
United States District Judge

Presented by:

/s/ Jack Collins
JACK COLLINS
First Assistant United States
Attorney

No. 79-575

In the Supreme Court of the United States

OCTOBER TERM, 1979

NED N. RICHARDSON AND DOROTHY M. RICHARDSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:

Andrus v. *Charlestone Stone Products Co.*, 436 U.S. 604	4
Best v. *Humboldt Mining Co.*, 371 U.S. 334	4
Converse v. *Udall*, 262 F.Supp. 583, aff'd, 399 F.2d 616, cert. denied, 393 U.S. 1025	9
Texas & N.O.R. Co. v. *Ry. Clerks*, 281 U.S. 548	10
United States v. *Coleman*, 390 U.S. 599	8-9
United States v. *General Dynamics Corp.*, 415 U.S. 486	10
United States v. *Nogueira*, 403 F.2d 816	9

Statutes and regulation:

Act of July 23, 1955 (Surface Resources Act or Multiple Surface Use Act), ch. 375, 69 Stat. 367, 30 U.S.C. 601 *et seq.*:	
Section 4, 30 U.S.C. 612	2, 4, 7, 8
Section 4(c), 30 U.S.C. 612(c)	9

Statutes and regulation—Continued Page

General Mining Act of 1872, 30 U.S.C. 22 *et seq.* 8

30 U.S.C. 26 8

36 C.F.R. Part 252 (39 Fed. Reg. 31317 (1974) 5, 10

36 C.F.R. 252.4-252.5 11

36 C.F.R. 252.7 11

36 C.F.R. 252.14(a) 11

Miscellaneous:

H.R. Rep. No. 730, 84th Cong., 1st Sess. (1955) 10

S. Rep. No. 554, 84th Cong., 1st Sess. (1955) 10

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-575

NED N. RICHARDSON AND DOROTHY M. RICHARDSON, PETITIONERS

v.

UNITED STATES OF AMERICA[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2) is reported at 599 F.2d 290. The opinion of the district court (Pet. App. A-19) is unreported.

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[1] The United States was the sole plaintiff-appellee in the court of appeals and, therefore, is the sole respondent in this Court. The caption of the petition incorrectly designates the Secretary of the Interior as the sole respondent. The Secretary has never been a party to this case. See Rule 21(4) of this Court; compare *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 89 (1946).

JURISDICTION

Judgment was entered in the court of appeals on May 11, 1979.[2] Rehearing was denied on July 9, 1979 (Pet. App. A-1). The petition for a writ of certiorari was filed on October 9, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' blasting and bulldozing constituted an unreasonable method of mineral exploration needlessly destructive of surface resources under the Surface Resources Act, 30 U.S.C. 612.

STATUTE INVOLVED

The Surface Resources Act, also known as the Multiple Surface Use Act, is Section 4 of the Act of July 23, 1955, ch. 375, 69 Stat. 367, 368-369, 30 U.S.C. 612, which states in part:

> (a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> (b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States

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[2] The judgment of the court of appeals is not appended to the petition. See Rule 23(1)(j) of this Court.

to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *.

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceding subsection (b). Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

STATEMENT

Since 1970, petitioners have held six unpatented mining claims [3] on public land of the United States in Skamania County, Washington, within the boundaries of Gifford Pinchot National Forest. The United States has admitted, for "purposes of this case only" (Stip. ¶ 3),[4] that petitioners are lawfully in possession of these mining claims.[5] Petitioners, in their turn, have conceded that they located their claims "subject to" the requirements of the Surface Resources Act, 30 U.S.C. 612 (Stip. ¶ 9).

Petitioners proceeded to explore the claims in order to develop a mine, using dynamite, bulldozers, and backhoes for surface excavations and trenching (Pet. App. A-3). Between 1970 and 1973, petitioners admit digging and blasting two trenches: one about

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[3] Rights attendant to unpatented mining claims have most recently been described in *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 605-607 nn.3 & 4, 615-616 (1978). See also *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963).

[4] "Stip." refers to the Stipulation and Pretrial Order filed January 26, 1977.

[5] Nevertheless, in October 1973 the Forest Service, Department of Agriculture, commenced administrative proceedings within the Department of the Interior to contest petitioners' claims and seek their cancellation for lack of discovery of any valuable mineral. *United States* v. *Ned N. Richardson, Dorothy M. Richardson, et al.*, Contest No. OR13345 (Wash.) 3920 (943.1). The administrative proceeding is still pending within the Bureau of Land Management, Department of the Interior. Its commencement predated, by approximately one month, the commencement of the instant case.

75 by 65 by 12 feet deep; another about 300 by 80-100 feet wide by 15 feet deep (Stip. ¶ 5; Pet. 4). Including the two trenches, all areas of surface disturbance affected 1.6 acres of national forest land (Pet. App. A-3). Periodic bulldozing also caused excavated overburden to slide into and occasionally obstruct Forest Services roads, to silt streams, and to impair natural drainage. The two trenches remained open in May 1975, one month after this case was tried (Pet. App. A-21, A-22 to A-23).[6]

In November 1973, this action against petitioners was commenced on behalf of the United States. The government requested a permanent injunction against further blasting and bulldozing on these six mining claims and a money judgment for costs of restoring surface areas already disturbed by such operations (Appellee's Br. 4-5). After submission of agreed facts in a pretrial order, the major factual dispute remaining was whether blasting and bulldozing were reasonable methods of exploring these six mining

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[6] The petitioners' assertion (Pet. 4) that "the Forest Service stopped their operation" in 1973 is not completely accurate. The record fails to show that any Forest Service employee had ordered—either formally or informally—a halt to all exploration before this case was filed in the district court. The pretrial stipulation merely recites that the Forest Service at some point "ordered [petitioners] * * * to cease digging trenches by blasting and bulldozing" (Stip. ¶ 4). It was not until a year later, August 28, 1974, that the Forest Service adopted the regulations which now enable the Service to control, through its administrative process, the manner by which mining and prospecting are done in national forests; see 36 C.F.R. Part 252.

claims or not. The district judge, to whom the issue was tried, found that they were not.[7]

The court of appeals found (Pet. App. A-19) that "utilization of blasting and bulldozing [in the areas where the two trenches were dug] * * * was unreasonable under the circumstances" (*id.* at A-25); that, because of newer, "nondestructive" methods of mineral exploration, "such as core drilling," it was "no longer standard procedure to strip away the overburden to expose the bed rock, especially during the initial exploration stage in which [petitioners] * * * were engaged" (*id.* at A-24 to A-25); and that such "destruction and removal of surface resources on the mining claim far exceeds that which was required to perform prospecting activities" (*id.* at A-32).[8] The court of appeals did not set aside these findings (Pet. App. A-11), and petitioners do not now assail them as clearly erroneous.

The district court's final judgment and decree permanently enjoined petitioners from "conducting pros-

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[7] The district judge heard expert witnesses for both sides and personally viewed the mining claims and the sites excavated by petitioners (Pet. App. A-21).

[8] The district court's findings comported with the trial testimony of the government's expert geologist. After examining petitioners' mining claims, this expert geologist stated that their continued exploration was justified in order to ascertain "the presence of commercial grade ore." But he cautioned, "the only acceptable initial approach to exploration of this type deposit would be core drilling after performance of all applicable surface geotechnical surveys. Small area excavations are virtually meaningless for this type of problem" (Pet. App. A-4).

pecting operations by means of bulldozing or blasting" on their six mining claims (Pet. App. A-37).[9] Petitioners appealed, and the court of appeals affirmed. The Ninth Circuit ruled, as had the district court (Pet. App. A-30 to A-31), that the Surface Resources Act, 30 U.S.C. 612, supported the injunction here. Testimony from congressional committee hearings, held when the Surface Resources Act was under consideration, was quoted to show that "Congress was aware of the problem of excessive bulldozing" on mining claims and meant to protect only uses "reasonably incident" to mining (Pet. App. A-10, A-16 to A-18). Because petitioners "did not have a mine, [but] * * * had a prospect," and were still exploring, the Ninth Circuit concluded, as had the district court,

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[9] A money judgment for $2,263.13 was also entered against petitioners. The money judgment represented the cost to the Forest Service of restoring the area where one of the two trenches had been dug; restoration work was to consist of filling trenches and providing drainage (Pet. 13). Prior to judgment, the district court had announced that it would consider issuing a mandatory injunction compelling the petitioners themselves to restore the area unless the parties, within 120 days, could settle on a joint plan of restoration (Pet. App. A-32, A-33). When no such joint plan emerged, the district court entered judgment for restoration costs instead of enjoining petitioners to perform the restoration work.

Petitioners never asked for an opportunity to contest the restoration costs before judgment. The government stated, in its brief to the court of appeals (Br. 31 n.23), that it would not object "to a remand for the limited purpose of granting * * * [petitioners] a hearing to contest the reasonableness of the dollar figure for restoring" the area in question. The court of appeals never addressed the matter.

that their "methods of exploration were unnecessary and were unreasonably destructive of surface resources and damaging to the environment" (Pet. App. A-11).[10]

ARGUMENT

The decision of the court of appeals is correct. It conflicts with no decision of this Court or any other court of appeals, and further review of this essentially fact-bound case is unwarranted.

1. The court of appeals and district court ruled that the Surface Resources Act, 30 U.S.C. 612, was intended to reconcile the competing interests of the United States, as holder of paramount title to the public lands, and those of mining claimants in the use of surface resources on such lands (Pet. App. A-10 to A-11, A-30). Admittedly, mining claimants who have located claims under the General Mining Act of 1872, 30 U.S.C. 22 *et seq.*, are afforded broad possessory rights to the surface within the limits of their claims, see, *e.g.*, 30 U.S.C. 26. Yet such rights have never been limitless. "Under the mining laws Congress has made the public lands available to people for the purpose of mining valuable mineral deposits *and not for other purposes*," *United States* v.

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[10] The district court had previously stressed that it was not imposing any "absolute prohibition" on mining or exploration activities on the six mining claims, saying petitioners "were requested to use an alternative method of prospecting which would have lessened their activities' impact on environment and surface resources while producing superior information at a lower cost" (Pet. App. A-31).

Coleman, 390 U.S. 599, 602 (1968) (emphasis added; footnote omitted). With passage in 1955 of the Surface Resources Act the rights of mining claimants to surface uses were more clearly defined. The Act's purpose "was not to abolish mining claims or to significantly alter mining law, but *to limit the use, or misuse, of surface resources* * * * by a mining claimant prior to the issuance of a patent," *Converse* v. *Udall*, 262 F.Supp. 583, 585 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969) (emphasis added). Accordingly, petitioners' assertion (Pet. 10-11) of an absolute right to prospect, mine, or explore any way they see fit is unsupportable. So, too, is their assertion (Pet. 13) that the government must prove that they are trespassers before a court can grant relief. Waste of surface resources is a sufficient ground for relief. *United States* v. *Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

The Act explicitly forbids mining claimants to "sever, remove, or use any vegetative or other surface resuorces" except to the extent "required" for "prospecting, mining or processing operations and uses reasonably incident thereto," for structures "in connection therewith," or "to provide clearance for such operations or uses." 30 U.S.C. 612(c). The House committee considered this text and concluded:

> This language, read together with the entire section, emphasizes recognition of the dominant right to use in the locator, *but strikes a balance, in the view of the committee, between competing*

> *surface uses, and surface versus subsurface competing uses.* [Emphasis added.]

H.R. Rep. No. 730, 84th Cong., 1st Sess. 10 (1955). Accord, S. Rep. No. 554, 84th Cong., 1st Sess. 9 (1955).

Both courts below correctly concluded that under the Act mineral prospecting and exploration techniques are subject to a rule of reason (Pet. App. A-11, A-32 to A-33). The unreasonableness of petitioners' conduct here is manifest.[11] While no judicial remedy is provided for in the Act, the district court properly fashioned an equitable remedy suitable for correcting violations of the Act. "Congress has legislated and made its purpose clear; it has provided enough federal law * * * from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960). See also *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 567-570 (1930).[12]

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[11] The findings of unreasonableness were not set aside as clearly erroneous by the court of appeals which refused to fault them "under the standard prescribed by Rule 52(a), Fed. R. Civ. P." (Pet. App. A-11). Since petitioners no longer contest the factual findings, they are bound by them. Cf. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

[12] While this case was pending in the district court, the Forest Service adopted new regulations governing the operations of mining claims in national forests. 36 C.F.R. Part 252, 39 Fed. Reg. 31317 (1974). Generally, the regulations

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

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DECEMBER 1979

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require mining claimants to submit a "notice of intention to operate" and a detailed "plan of operations" to the Forest Service's local district ranger for approval, disapproval, or modification (36 C.F.R. 252.4-252.5). Failure to comply with the regulations or the approved plan of operations can result in issuance of a "notice of noncompliance" with instructions on corrective measures to be taken (36 C.F.R. 252.7). Any decision by a Forest Service official is appealable to the regional forester whose decision is "the final administrative appeal decision" (36 C.F.R. 252.14(a)). At no time in this case has the validity of these regulations been contested by petitioners or passed upon by the courts. This case therefore does not present any issue of more than isolated effect.

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